SIGNED: 11/19/03

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RYAN ROWINSKI,	:	**No. 3:02cv2014**
on behalf of himself and all others	:	
***similarly situated*,**	:	**(Judge Munley)**
Plaintiff	:	
	:	
v.	:	
	:	
SALOMON SMITH BARNEY, INC.,	:	
Defendant	:	
	:	

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MEMORANDUM

Before the court for disposition are the plaintiff's motion to remand to the Lackawanna County Court of Common Pleas and the defendant's cross-motion to dismiss. The plaintiff is Ryan Rowinski, on behalf of himself and all others similarly situated, and the defendant is Salomon Smith Barney ("SSB"). For the following reasons, we will deny the plaintiff's motion to remand and grant the defendant's motion to dismiss.

Background

SSB offers consumers, among other things, access to its research and analysis with regard to potential investments. Compl. ¶¶ 1, 11-19. SSB represents that this research and analysis is objective and designed for the benefit of consumers. Id. In return for providing access to its proprietary research, SSB charges consumers periodic fees, including annual account maintenance fees, and other fees that are captured as premiums in its other sales charges levied on consumers. Id. at 19.

SSB also provides investment banking services to companies. Compl. ¶¶ 20-21.

SSB's investment banking business is far more lucrative than its retail brokerage business, which includes the sale of its research and analysis. Id.

Plaintiff alleges that SSB "failed to ensure that the analysis provided to its millions of retail brokerage customers would not be influenced by its investment banking operations." Compl. ¶ 24. Contrary to SSB's marketing and contractual obligations to its consumer clients, plaintiff alleges that SSB's research and analysis was not objective, but rather a tool for the benefit of its investment banking business. Id. As a result, plaintiff contends that SSB charged its consumer clients a premium for providing a valuable product: objective analysis, but it actually provided them with another, valueless product: biased research. Compl. ¶¶ 47-51.

On October, 9, 2002, Rowisnki filed a complaint in the Pennsylvania Court of Common Pleas, on behalf of himself and a class of SSB's retail consumers. Plaintiff claims that he, like other consumer clients, paid SSB for access to objective research and analysis, but did not get the benefit of his bargain. Compl. ¶¶ 1-3. The complaint contains three counts: Count I for Breach of Contract; Count II for Unjust Enrichment and Restitution; and Count III for Deceptive Consumer Practices under Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. § 201-1, et seq. On November 6, 2002, SSB removed the action to this Court, asserting that the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. §78bb, preempts plaintiff's state law claims. On December 12, 2002, plaintiff moved to remand his complaint to the Lackawanna County

Court of Common Pleas asserting that SLUSA does not preempt his claims and, as a result, this court lacks subject matter jurisdiction. On December 30, 2002, SSB filed its cross-motion to dismiss, bringing the case to its present posture.

Discussion

Generally, a defendant can remove a civil action that was filed in state court if the federal court would have had original jurisdiction to address the matter. 28 U.S.C. § 1441. In the petition for removal, the defendant indicates that this court has jurisdiction under 15 U.S.C. §§ 78bb(f)(2) and 77p(c) and 28 U.S.C. § 1331 ("Federal question - The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.")[1]

The jurisdiction of this court, therefore, is contingent upon SLUSA's preemption of plaintiff's state law claims. If we conclude that SLUSA preempts plaintiff's state law claims, then we have original jurisdiction to address this matter and will grant defendant's motion to

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[1] The defendant also indicates that this court has jurisdiction pursuant to the diversity jurisdiction statute, 28 U.S.C. § 1332. Pursuant to this statutory section, jurisdiction is proper in federal district court where the action involves citizens of different states and an amount in controversy, exclusive of interest and costs, in excess of $75,000.00. See 28 U.S.C. § 1332(a). The defendant, as the removing party, must demonstrate that the amount in controversy exceeds the jurisdictional threshold. See Meritcare Inc. v. St. Paul Mercury Ins., 166 F.3d 214, 222 (3d Cir. 1999). In addition, removal statutes are to be strictly construed against removal, and all doubts should be resolved in favor of remand. Boyer v. Snap-On Tools Corp., 913 F.3d 108, 111 (3d Cir. 1990). In the present case, defendant has asserted that the plaintiff and defendant are citizens of different states. See Notice of Removal ¶ 13. The defendant has not, however, proven that the amount in controversy exceeds the jurisdictional threshold of $75,000.00. Defendant asserts that its cost in complying with the requested injunctive relief would exceed the sum of $75,000.00. Id. ¶¶ 12, 14. The defendant has not, however, provided any evidence to support its assertion. Without any evidence, an inference as to whether the amount in controversy will exceed $75,000.00 is "pure guesswork. If the Court has to guess, Defendant has not proved his point." Irving v. Allstate Indem. Co., 97 F. Supp. 2d 653, 656 (W.D. Pa. 2000). We find that the defendant has failed to sustain its burden of proving that these claims meet the required jurisdictional amount. Accordingly, we have determined that we lack diversity jurisdiction.

dismiss. If, on the other hand, we conclude that SLUSA does not preempt plaintiff's state law claims, then plaintiff's motion to remand will be granted and SSB's motion to dismiss will be denied for lack of jurisdiction.

SLUSA provides that:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging--
> (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or
> (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. §78bb(f)(1).

Therefore, SLUSA only preempts a claim where four conditions are met: (1) the underlying suit is a "covered class action"; (2) the claim is based on state law; (3) the claim concerns a "covered security"; and (4) the plaintiff alleges "a misrepresentation or omission of material fact," or "a manipulative or deceptive device or contrivance, in connection with the purchase or sale of a covered security."[2] Id.; see also Green v. Ameritrade, 279 F.3d 590, 596 (8th Cir. 2001); Haney v. Pacific Telesis Group, No. 01-C758, 2000 U.S. Dist. LEXIS 16218, at *57-58 (C.D. Cal. Sept. 19, 2000).

The parties do not dispute that the underlying suit is a class action or that the claims are based on state law. The real dispute between the parties is whether there was "a

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[2] SLUSA carves out certain limited exceptions, 15 U.S.C. § 77p(d); 15 U.S.C. § 78bb(f)(3), but none applies here and the parties do not contend otherwise.

misrepresentation or omission of a material fact in connection with" the purchase or sale of a covered security.[3]

Plaintiff first contends that "there is no 'misrepresentation or omission' that would provide the basis for SLUSA preemption . . .." Plaintiff's Brief, p. 16. We disagree. Plaintiff accuses SSB of untrue, manipulative and deceptive misrepresentations and omissions in its analyst reports. See Compl. ¶ 2 ("Defendant artificially inflates the ratings and analysis of its investment banking clients"); Compl. ¶ 3 ("Defendant has provided its customers with a useless product - biased investment analysis - while charging them a premium for a purportedly valuable product - unbiased analysis"); Compl. ¶ 25 (Defendant's brokerage customers were provided with "misleading and overly optimistic analyst reports."). See, e.g., Araujo v. John Hancock Life Ins. Co., 206 F. Supp. 2d 377, 385 (E.D.N.Y. 2002) (holding that plaintiff's claims are preempted by SLUSA where allegations sound in fraud even though "they are framed as state law claims."); Korsinsky v. Salomon Smith Barney, Inc., No. 01-C6085, 2002 U.S. Dist. LEXIS 259, at *11 (S.D.N.Y. Jan. 10, 2002) (holding that the "in connection with" requirement is satisfied where, "[a]lthough the complaint

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[3] A "covered security" under SLUSA is a security listed, or authorized for listing, on the New York Stock Exchange, the American Stock Exchange, or the National Market System of NASDAQ. 15 U.S.C. § 77p(f)(3); 15 U.S.C. 78bb(f)(5)(E) (referencing 15 U.S.C. § 77r(b)). Plaintiff does not dispute defendant's assertion that "the securities as to which SSB analysts issue research reports and recommendations and the securities that SSB purchases or sells on behalf of its retail customers are, almost uniformly, securities listed or authorized for listing on either the New York Stock Exchange, the American Stock Exchange or the National Market System of the Nasdaq Stock Market." Defendant's Brief p. 10. Accordingly, if this court finds that the alleged misconduct was "in connection" with the purchase and sale of securities, the securities are "covered" for the purposes of the third element of SLUSA.

clearly states that 'this is not an action for fraud,' it outlines several instances of alleged misrepresentations made by SSB and Grubman with regard to the value of [a particular telecommunications client]."). Accordingly, we conclude that the plaintiff alleges a "misrepresentation or omission of material fact."

Plaintiff also contends that this alleged misconduct was not "in connection" with the purchase or sale of securities because the plaintiff does not allege that he was induced to purchase or sell securities. Plaintiff's Brief p. 10. We, once again, disagree. In interpreting SLUSA's "in connection with" language, courts look to cases interpreting virtually identical language under § 10(b) of the Securities Exchange Act of 1934 ("Section 10(b)"), 15 U.S.C. § 78(j)(b). See, e.g., Green, 279 F.3d at 597-98. The United States Supreme Court has cautioned that the "in connection with" language in section 10(b) "should be construed, 'not technically and restrictively, but flexibly'" in order to include both typical and novel forms of fraud. Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 151 (1972). The "in connection with" requirement is satisfied, if the buyer or seller of a security suffers an injury as a result of "deceptive practices touching" on the purchase or sale of securities. Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co., 404 U.S. 6, 12-13 (1971). "It is enough that the scheme to defraud and the sale of securities coincide." SEC v. Zandford, 535 U.S. 813, 821 (2002).

Plaintiff asserts in his complaint that the alleged misconduct is not tied to the purchase of securities, only that he did not receive the type of information from SSB that he believed

he had contracted for and for which he had paid an administrative fee. See Plaintiff's Reply, pp. 14-15. Plaintiff, however, is unable to escape the obvious connection between the alleged misrepresentations in SSB's analyst reports and the purchase and sale of securities. Although plaintiff is careful to avoid alleging that his stock purchase decisions were affected, plaintiff would not be concerned with the accuracy of SSB's analyst reports unless he intended to, and did, in fact, rely on them in deciding to purchase or sell stock.[4]

Moreover, the class that plaintiff seeks to represent are those who maintained SSB accounts and paid "commissions or fees" to SSB. Compl. ¶39. A commission is earned by SSB only when a customer purchases or sells securities. Defendant's Brief, p. 16. Because plaintiff's class includes those who paid commissions on the sale or purchase of securities, we conclude that his claims are "in connection with" the purchase or sale of securities. See, e.g., Behlen v. Merrill Lynch & Co., 311 F.3d 1087, 1094 (11th Cir. 2002) (holding that the "in connection with" requirement is satisfied where "the fees and commissions were not incidental to the sale of the securities, but were an integral part of the transactions"); and McCullagh v. Merrill Lynch & Co., No. 01-C7322, 2002 U.S. Dist. LEXIS 3758, at *11

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[4] This factual dependence of plaintiff's complaint on SSB's alleged misrepresentations regarding the value of particular securities distinguishes this case from the "brokerage services" cases that plaintiff relies upon. See Plaintiff's Reply Memo., pp. 8-13. In Spielman v. Merrill Lynch, No. 01-C3013, 2001 U.S. Dist. LEXIS 15943 (S.D.N.Y. October 9, 2001), for example, the plaintiff alleged that the defendant misrepresented the charge for the commission on the purchase of certain securities. Id. at *2-3. There, the court held that the alleged misrepresentations concerning hidden transactions fees did not satisfy SLUSA's "in connection with" requirement because such statements did not relate to the value of the underlying securities. Id. at *15-16. Here, on the other hand, this court finds that the alleged misconduct relates to the value of underlying securities. In particular, plaintiff alleges that a conflict of interest between SSB's retail customers and its investment banking clients affected the reliability of SSB's valuation and recommendation of particular securities. See Compl. ¶¶ 18, 22-32. SLUSA's "in connection with" requirement is thus clearly satisfied.

(S.D.N.Y. March 5, 2002) (holding that the "in connection with" requirement is satisfied where, "[a]lthough Plaintiffs do not allege the purchase of specific stocks based on the recommendations, their allegations are clearly about the purchase of stocks because they seek disgorgement of commissions paid to Merrill Lynch."). Accordingly, plaintiff's claims meet the four SLUSA requirements.[5]

Once the requirements of the SLUSA are met, the statute precludes all state law causes of action. See 15 U.S.C. § 77p(b); 15 U.S.C. § 78bb(f)(1). Accordingly, plaintiff's state law claims will be dismissed.[6]

Conclusion

Consequently, plaintiff's motion to remand is denied, SSB's motion to dismiss upon SLUSA is granted and plaintiff's claims are dismissed without prejudice. An appropriate order follows.

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Plaintiff also relies on Green v. Ameritrade, 279 F.3d 590 (8th Cir. 2001), to support his contention that his claims are not "in connection with" a purchase or sale of securities. See Plaintiff's Brief, p. 14. In Green, the plaintiff alleged that his broker promised to provide him with access to "real time" stock quotes, but had failed to deliver the information as promised. Green, 279 F.3d at 593-94. The Eighth Circuit examined the complaint and found that there was no allegation that plaintiff or anyone else purchased or sold securities, only that plaintiff purchased information from the broker. Id. at 598-99. As a result, the court held that plaintiff's claim was not "in connection with" a purchase or sale of securities. Id. Green, however, is distinguishable from the present case. There, the class members sought to recover a flat monthly fee rather than, as here, commission fees. Moreover, the claimed breach in Green related to the provision of incomplete or inaccurate data rather than, as here, misrepresentations as to the value of securities.

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Plaintiff may be able to assert claims under federal securities law. Therefore, plaintiff's claims will be dismissed without prejudice.

IN THE UNITED STATES DISTRICT COURT
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RYAN ROWINSKI,	:	**No. 3:02cv2014**
on behalf of himself and all others	:	
***similarly situated*,**	:	**(Judge Munley)**
Plaintiff	:	
	:	
v.	:	
	:	
SALOMON SMITH BARNEY, INC.,	:	
Defendant	:	
	:	

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ORDER

AND NOW, to wit, this _____ day of November 2003, the plaintiff's motion to remand (Doc. 9) is **DENIED**, the defendant's motion to dismiss (Doc. 12) the complaint due to SLUSA preemption is **GRANTED** and plaintiff's claims are dismissed **WITHOUT PREJUDICE**. The Clerk of Court is directed to close this case.

BY THE COURT:

_____
JUDGE JAMES M. MUNLEY
United States District Court

FILED: 11/20/03